IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1215

IN THE MATTER OF GRAND JURY IMPANELED JANUARY 21, 1975.

ABRAHAM E. FREEDMAN, Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JANUARY 21, 1975.

ABRAHAM E. FREEDMAN, *Appellant*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner Abraham E. Freedman respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 8, 1976.

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the District of New Jersey is reported at 399 F. Supp. 668 (D. N. J. 1975) and appears in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on January 8, 1976. A timely petition for rehearing en banc was denied on February 4, 1976, and this petition for certiorari was filed within 30 days of that date. The jurisdiction of the Court of Appeals was invoked under 28 U. S. C. § 1291. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether an individual who has absolute ownership and control of a law practice, and the exclusive right of access to its records, has a privilege under the Fifth Amendment to resist compulsory production of such records.

CONSTITUTIONAL PROVISION INVOLVED.

Fifth Amendment to the Constitution of the United States:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

STATEMENT OF THE CASE.

On June 18, 1975, a Grand Jury sitting in Newark in the District of New Jersey caused a subpoena duces tecum to be served on the law offices of Freedman, Borowsky and Lorry in Philadelphia, Pennsylvania. The subpoena purported to command the production of twenty-six categories of financial records and other documents involving the relationships between Freedman, Borowsky and Lorry and every one of its clients for the past ten years. The alleged subject matter of the grand jury investigation was possible violations of federal criminal laws involving one of the clients of Freedman, Borowsky and Lorry, the National Maritime Union.

Appellant Abraham E. Freedman asserted from the outset that he owned, possessed and controlled the subpoenaed records, and, in various proceedings before the District Court, resisted the subpoena principally on the basis of his Fifth Amendment privilege against self-incrimination.[1]

In an evidentiary hearing held to resolve the Fifth Amendment issue, Mr. Freedman established by uncontradicted evidence that he formed the predecessor to Freedman, Borowsky and Lorry in 1933 and since then has practiced law under various firm names, the most recent being Freedman, Borowsky and Lorry (F. F. 3-6, 467a-468a; 144a-149a);[2] he has and always had exclusive power

1. Mr. Freedman also asserted that (a) the subpoena was overbroad under the Fourth Amendment; (b) the grand jury investigation may have been the product of unauthorized electronic surveillance; and (c) the government had failed to demonstrate jurisdiction, relevancy, and proper purpose as required by *In re Grand Jury Proceeding*, 486 F. 2d 85 (3 Cir. 1973) (*Schofield I*) and *In re Grand Jury Proceedings*, 507 F. 2d 963 (3 Cir. 1975) (*Schofield II*).

2. Record references suffixed by an "a" are to pages of the Appendix filed with the Court of Appeals on November 24, 1975. "F. F." refers to the Findings of Fact in the Opinion of the District Court.

over the management and policy decisions of Freedman, Borowsky and Lorry (151a); the law practice has no policy making body, and is not governed by a charter, by-laws, or any other oral or written partnership agreement (F. F. 9, 468a; 151a; 226a); Mr. Freedman alone can refuse a case or terminate representation of a client, and he alone decides the annual compensation of the other attorneys in the office (F. F. 20, 470a; F. F. 21, 470a; 151a; 154a; 203a; 228a); Mr. Freedman has sole power to hire and fire and owns all of the assets and the case files themselves (96a; 109a; 156a-158a; 167a; 226a-227a).

Moreover, the undisputed evidence established that Mr. Freedman has exclusive rights of control over and access to the subpoenaed records. It was uncontradicted and found by the District Court as a fact that Mr. Freedman has absolute dominion over the records, maintains them under lock and key, and other attorneys can examine them only at Mr. Freedman's pleasure (F. F. 32, 472a; F. F. 71, 478a; 158a-159a). The exclusiveness and extent of Mr. Freedman's control over the records was underscored by the further finding of the District Court that Mr. Freedman's associate, Mr. Lorry, in his 22 year association with Mr. Freedman, never once saw the firm's records or tax returns (F. F. 70, 478a; F. F. 72, 478a; 227a).

The District Court denied all of Mr. Freedman's claims, including his claim of the Fifth Amendment privilege. On appeal from a civil contempt order, the Court of Appeals, in an opinion written by Judge Gibbons,[3] affirmed the denial of Mr. Freedman's Fourth Amendment, Fifth Amendment and electronic surveillance contentions, but reversed and remanded for non-compliance by the Government with the Third Circuit's decisions in *Schofield I* and *Schofield II*. The Government was directed on remand to make a more sufficient showing of the relevancy of the items sought by the subpoena to the subject matter of the grand jury's investigation. Mr. Freedman's Petition For Rehearing En Banc on the Fifth Amendment issue was denied on February 4, 1976 with Judge Arlin Adams dissenting and voting to grant rehearing.

3. The panel consisted of Chief Judge Seitz, Judge Gibbons, and Judge Rosenn.

REASONS FOR GRANTING THE WRIT.

I. The Third Circuit Discarded and Then Rewrote *Bellis v. United States* So as to Exclude Virtually All Business Records From the Scope of the Fifth Amendment Privilege.

Both parties and both lower courts agree that the outcome of Mr. Freedman's claim of privilege must be determined by application of the test set forth by this Court in *Bellis v. United States*, 417 U. S. 85 (1974). The problem with the opinion below, however, and the reason why this Court's review is of critical necessity, is that the Third Circuit has applied *Bellis* in name only. The actual test set forth in *Bellis* has been discarded and a test has been substituted that is without precedent and in direct conflict with the language of *Bellis* and with the purposes of the privilege against self-incrimination.

In *Bellis*, a partner in a three man law firm organized as a partnership under Pennsylvania law refused to produce subpoenaed partnership records on the grounds of his personal privilege against self-incrimination. This Court held that the privilege against self-incrimination was inapplicable in the circumstances. It recognized, however, that if business records are cloaked by an expectation of privacy and confidentiality on the part of an individual person, they like any other record, could be privileged under the Fifth Amendment. *Id.* at 87-88, 91.

In the key passage of the *Bellis* opinion, this Court set down the following test to determine when business records are subject to the privilege:

> "This analysis presupposes the *existence of an organization which is recognized as an independent entity apart from its individual members.* The group *must* be relatively well organized and structured, and not merely a loose, informal association of individuals. It *must* maintain a distinct set of organizational *records and recognize rights in its members of control and access to them.* And the records subpoenaed *must* in fact be organizational records held in a *representative capacity.*" *Bellis, supra* at 92-93 (emphasis supplied).

Under this test, this Court mandated in clear and unequivocal language that for records to be beyond the Fifth Amendment privilege, there (1) "*must*" be an independent entity, which (2) "*must*" maintain a distinct set of records "*and recognize rights in its members of control and access to them*".

In the face of the crystal clear, mandatory requirement of *Bellis* that others "*must*" have rights of control and access to the records, and despite the uncontradicted evidence that no one other than Mr. Freedman has such rights to the records subpoenaed in this case, the Third Circuit reasoned:

> "Freedman contends that the district court's finding that he alone among the lawyers had access to the books and ledgers of Freedman, Borowsky & Lorry establishes his privilege to the records under the second prong of the *Bellis* test. This argument distorts the holding of that case.
>
> We do not understand *Bellis* to hold that once an institution is determined to be an entity independent of its members, the records of that entity may nonetheless be protected by the purely personal privilege against self incrimination if the members of the organization agree that access to those records will not be shared. *Access is one indicium bearing upon the*

> *question of institutional separateness.* In this case, the facts found by the district court, including facts pertaining to Freedman's exclusive access to certain financial books and records, fully support the conclusion that Freedman, Borowsky & Lorry has an institutional identity apart from Freedman. *That being so, the fact that Freedman preserves his exclusive access to certain records is inconsequential for fifth amendment purposes.* To hold the members of an institution could resurrect the fifth amendment privilege with respect to records that they individually forfeited by identifying themselves with that institution would seriously erode the established principle that the privilege against self-incrimination is purely personal. See *Hale v. Henkel,* 201 U. S. 43 (1906). This we decline to do. We therefore hold that Freedman was not legally entitled to assert his fifth amendment privilege in defense to production of the subpoenaed records." (emphasis supplied). See page A 8 of Appendix B hereto.

The gravamen of this reasoning is the Third Circuit's conclusion that "access is one indicium bearing upon the question of institutional separateness". However, *Bellis* does not make access "one indicium". On the contrary, *Bellis* makes access one of two essential prerequisites to overruling a claim of privilege, and requires unequivocally that the organization "*must . . . recognize rights in its members of control and access to them.*"

By twisting the two prongs of *Bellis* into a single-pronged test, the Third Circuit divorced the *Bellis* test from the rationale upon which it was premised. That rationale is that business records are subject to the privilege against self-incrimination asserted by an individual who has in such records an expectation of privacy sufficient to proscribe compulsory state intrusion. 417 U. S. at 91. Whether there is such an expectation of privacy depends upon the extent to which others have legal rights of control and access to the records involved. To the extent others have such rights, then a justifiable expectation of privacy does not exist. On the other hand, where only one individual has a right of control or access to records, then that individual generally will have an expectation of privacy sufficiently strong to justify a privilege against compulsory government intrusion. This Court, in *Bellis, supra* at 92, emphasized this direct relationship between an expectation of privacy and exclusive access to and control over business records when it said:

> "characteristics of a claim of privacy and confidentiality (are) control over their (the records') content and location and the *right* to keep them from the view of others."

By relegating the *second* prong of the *Bellis* test to an "indicium", and an "inconsequential" one at that, the Third Circuit has emasculated this Court's test and substituted a new one that as a practical matter will *never* protect legitimate expectations of privacy in business records. Sometimes, asking *only* whether an entity, such as a law firm, has a "separate institutional existence" also will be determinative of who has "rights of access" to the entity's records. This is so because

> "organization records '(u)sually, if not always . . . are open to inspection by the members', that 'this right may be enforced on appropriate occasions by available legal procedures,' and that (t)hey therefore embody no element of personal privacy." *Bellis, supra* at 92 quoting *United States v. White,* 322 U. S. 694, 699 (1944).

In other words, an "independent entity" often is an entity chartered under a state organic law or organized pursuant to an operating agreement that expressly confers rights of record inspection upon its members.

Thus, in every appellate case, to date, in which *Bellis* has been applied to determine whether an individual has a Fifth Amendment privilege against producing business records of an entity, the entity *always* has been one created under a state law which conferred "access" rights on the members of the entity, just as the state chartered law partnership in *Bellis* itself. *In re Jeffords,* 519 F. 2d 1398 (3 Cir. 1975), *cert. denied* 44 U. S. L. W. 3238 (U. S. Oct. 21, 1975) (corporation); *Kuta v. United States,* 518 F. 2d 947 (7 Cir. 1975), *cert. denied* 44 U. S. L. W. 3344 (U. S. Dec. 9, 1975) (state chartered law partnership); *United States v. Mahady & Mahady,* 512 F. 2d 521 (3 Cir. 1975) (state chartered partnership); *Reamer v. Beall,* 506 F. 2d 1345 (4 Cir. 1974) (corporation); *United States v. Hansen-Niederhauser Co., Inc.,* 522 F. 2d 1037 (10 Cir. 1975) (corporation); *United States v. Kahler,* No. 74-1203 (4 Cir., Aug. 1, 1974) (state chartered partnership); *United States v. Cobb,* No. 75-1034 (6 Cir., May 16, 1975) *cert. denied* 44 U. S. L. W. 3144 (U. S. Nov. 4, 1975) (state chartered partnership); *United States v. Scornavocco's Restaurant, Inc.,* No. 75-1483 (7 Cir., Dec. 24, 1975) (corporation).

Thus, application of the first prong of the *Bellis* test, whether there is an independent entity, *often* serves to resolve the critical issue of individual expectation of privacy. However, the first prong does not *necessarily* dispose of the critical issue. It breaks down when the entity in question is *not* governed by state law or operating agreement, as the District Court expressly so found with respect to Freedman, Borowsky and Lorry (F. F. 9, 468a; 144a; 151a; 226a). For such entities the "access" question *must* be

asked *directly* to determine whether any one person has an expectation of privacy with respect to subpoenaed records of the entity. It makes no sense to conclude that a Fifth Amendment privilege is inapplicable because an entity exists when only one member of that entity has complete, exclusive and personal control of the records of that entity. That one member has the same expectations of privacy with respect to those records as he has with respect to any other of his personal papers. For that reason, this Court, in *Bellis* set forth a two, not a one, prong test.

Nor is this revision of the *Bellis* test of academic interest only. On the contrary, by recasting the *Bellis* test, the Third Circuit has veered sharply down a path that no other Court has travelled upon before. This is because the practical effect of excision of the second prong of the *Bellis* test is to limit the scope of the Fifth Amendment privilege to non-business records contrary to the repeated pronouncements of this Court.

In a longstanding line of cases, of which *Bellis* is the most recent, this Court has continually emphasized that business records can be protected by an individual's privilege against self-incrimination. See, *e.g., Bellis,* at 87-88; *United States v. White,* 322 U. S. 694 (1944); *Boyd v. United States,* 116 U. S. 616 (1886). While seeming to adhere to this important principle, the Third Circuit's revision of *Bellis* will have the practical effect of excluding most, if not all, business records from the sphere of information potentially protected by the Fifth Amendment.[4]

4. In effect, this would be a step toward incorporating the new philosophy of the Fifth Amendment privilege that has been suggested by Judge Gibbons in his concurrence in *United States v. Fisher,* 500 F. 2d 683 (3 Cir. 1974) *cert. granted* 43 U. S. L. W. 3416 (U. S., Jan. 27, 1975) and by Judge Friendly in *United States v. Beattie,* 522 F. 2d 267 (2 Cir. 1975), *petition for cert. filed* (Sept. 15, 1975) (No. 75-407). In brief, this new philosophy would remove almost all documents from the scope of the Fifth Amendment protections, except those which can be authenticated in no other

The Third Circuit has achieved this result by shifting the focus of *Bellis* from the subpoenaed records, and expectations of privacy surrounding them, to a study of "entities" and their external appearances. Under the reconstituted *Bellis* test, the key (and only) question is whether there is something—an "entity"—that "possesses an identity separate and distinct from that of the" person claiming the privilege. See page A 7 of Appendix B hereto. This metaphysical question is answered, in turn, by examining whether the "entity" possesses the "objective indicia of institutional status." See page A 7 of Appendix B hereto.

The implications of this approach, and the reason why it limits the Fifth Amendment privilege to non-business records, is brought into sharp focus by the list of "indicia" held sufficient to establish the existence of an independent entity. The reason why Mr. Freedman could not assert his privilege, according to the Third Circuit, was because Freedman, Borowsky and Lorry has been held out

> ". . . to the public, the Courts and the legal profession as a partnership, has filed both federal and local partnership tax returns, has leased office space in the partnership name and purchased office equipment, real estate, securities and insurance in the name of the firm. . . ." [5] See page A 7 of Appendix B hereto.

4. (Cont'd.)
way except by the act of turning them over. Business records, almost always can be authenticated by someone other than the possessor (e.g. accountants, employees) and, thus, would virtually never be privileged regardless of the fact that the possessor may be the only person having the right of control over and access to such records.

5. It should be noted that the Court of Appeals chose to give no weight to the Record facts and District Court findings that it was Mr. Freedman who made the decision to hold his law practice out as a partnership because he thought it was good business practice. His decision in no way changed the internal character of the firm from that of a large, successful sole proprietorship (F. F. 68, 477a; F. F. 69, 477a; 232a; 259a).

The problem with relying on these "indicia" is that they are present in practically every business, from the smallest to the largest. Businesses almost always have their own names, and the owner of that business often will lease property, buy equipment, open a bank account, trade with the public, and buy from suppliers in the business name. By applying the Third Circuit's "indicia" approach, the business records of sole proprietorships, heretofore privileged under *Bellis*, now will end up before grand juries. To illustrate, a dentist might decide to call himself "Family Dental Clinic", hire a receptionist and a hygienist, lease office space, buy equipment and supplies, send out bills in his trade name, and manage the business affairs and books of his practice all by himself. The public may never realize that "Family Dental Clinic" is nothing more than the alter ego of the dentist. Under *Bellis,* the dentist nevertheless could invoke his Fifth Amendment privilege against compulsory production of his business records. Under the Third Circuit's Opinion in his case, however, the "objective indicia" of a "separate and distinct" entity are present, and the dentist will lose his Fifth Amendment privilege although only he controls and has access to his business records. It is submitted that such a result is contrary to the expectations and values of our citizens who do not understand or desire that our constitutional right of privacy stop at the doors of sole proprietorships and family businesses.

In short, the Third Circuit, while purporting to apply *Bellis,* has altered dramatically its underlying philosophy. The philosophical shift is significant particularly now when grand juries and other law enforcement agencies throughout the nation are taking an intense interest in private business affairs. This Court's guidance is urgently needed so that lower courts, the public, and prosecutors will know

whether the philosophy of *Bellis* still has vitality or whether other courts will be permitted to follow the Third Circuit's lead and carve business records out of the circle of information potentially privileged under the Fifth Amendment. Whatever the merits of this important issue the scope of the Fifth Amendment privilege ought not to be constricted so severely without express consideration and guidance from this Court.[6]

6. The "Family Dental Clinic" hypothetical above is substantially similar to the facts in two cases currently awaiting decision by this Court, and, thus, suggests still another reason why certiorari should be granted. In one of these cases, *Shaffer v. Wilson*, No. 74-1671 (10 Cir., May 23, 1975) *petition for cert. filed*, 44 U. S. L. W. 3321 (U. S. Nov. 25, 1975), this Court has not yet decided whether to grant certiorari. In the other, certiorari has been granted. *Andresen v. Maryland*, 24 Md. App. 128, 331 A. 2d 78 (1975) *cert. granted* 44 U. S. L. W. 3200-01 (U. S. Oct. 7, 1975). *Shaffer* involved government seizure of business records of a small dental practice. *Andresen* involved government seizure of business records of a small law practice. In both cases, the issue is whether the government can seize by search warrant under the Fourth Amendment documents that are privileged under the Fifth Amendment. Obviously, to decide this issue, this Court will have to decide or assume that the appellants in *Andresen* (and *Shaffer* if certiorari is granted) have a Fifth Amendment privilege with respect to the records involved therein. However, a decision in favor of the Fifth Amendment privilege in either of these cases cannot stand together with the decision below of the Third Circuit. Under the Third Circuit's "indicia" test it is highly likely that the *Shaffer* and *Andresen* records would not be privileged. Since the Fifth Amendment issue herein overlaps with the same issue in *Andresen* (and *Shaffer* if certiorari is granted), we respectfully request this Court to grant certiorari and decide all of these cases together.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit on the limited question presented by this Petition.

Respectfully submitted,

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February 23, 1976.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 75-2312

IN THE MATTER OF GRAND JURY IMPANELED
January 21, 1975

ABRAHAM E. FREEDMAN, Appellant

(D. C. Misc. No. 75-11)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Adams would grant rehearing by the court en banc.

By the Court,
JOSEPH J. GIBBONS
Judge

Dated: February 4, 1976

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2312

IN THE MATTER OF GRAND JURY IMPANELED JANUARY 21, 1975

ABRAHAM E. FREEDMAN, Appellant

(D.C. Misc. No. 75-11)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 8, 1975
Before SEITZ, *Chief Judge,* GIBBONS and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 8, 1976)

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GIBBONS, *Circuit Judge*

This is an appeal from an order of the district court adjudging appellant Abraham Freedman in civil contempt for his refusal to obey a court order enforcing a grand jury subpoena duces tecum.[1] The subpoena, dated June 16, 1975, requested the production of 26 categories of documents dealing with various aspects of the financial affairs of the Philadelphia law firm of Freedman, Borowsky & Lorry for the previous 10 years. It was addressed to "Any Responsible Officer Freedman, Borowsky & Lorry," was served on Freedman on June 18, 1975, and was returnable before the Grand Jury at Newark, New Jersey on June 23, 1975. By agreement with the United States Attorney the return date was extended to permit disposition of a motion to quash. On July 11, 1975 Freedman moved to quash. The motion asserted that Freedman "owns, possesses and controls the books, papers and records described in said subpoena" and resisted compliance on grounds (1) that there was no showing that the records were relevant to any investigation over which the Newark Grand Jury had jurisdiction, and (2) that the subpoena was unconstitutionally overbroad both in scope and in time. In response to this motion the government filed an affidavit which disclosed that the grand jury was investigating alleged violations of federal criminal law by the National Maritime Union, its officers and employees, including potential violations of the Internal Revenue Code, 26 U.S.C. § 7201 et seq., the Interstate Travel Act, 18 U.S.C. § 1952 and the

1. The district court opinion is reported at 399 F. Supp. 668 (D. N.J. 1975).

Federal Conspiracy Statute, 18 U.S.C. § 371. The affidavit states in part:

> In essence, the grand jury is investigating allegations that officers and employees who are or were New Jersey residents made and received illegal payments, which payments may not have been reported as income by the recipients and which may have been illegally deducted as business expenses on the income tax returns of the payors.
>
> . . . .
>
> [I]n the context of this investigation there were allegations of criminal wrongdoing on the part of members of the firm of Freedman, Borowsky and Lorry.
>
> . . . .
>
> The items sought in the subpoena were relevant and necessary to the Grand Jury investigation and are not sought primarily for another purpose.[2]

At a hearing on the motion to quash on July 14, 1975, Freedman contended that the government's affidavit was an insufficient compliance with *In re Grand Jury Proceedings,* 486 F.2d 85 (3d Cir. 1973) (*Schofield I*) and *In re Grand Jury Proceedings,* 507 F.2d 963 (3d Cir. 1975) (*Schofield II*). The district court ruled that the government had satisfied the *Schofield* criteria, denied the motion to quash, and directed Freedman to "produce at 10 A.M. on Tuesday, July 15, 1975, to the Grand Jury, any and all books, records, documents and correspondence set forth in the Subpoena duly served upon the movant." The order did not direct Freedman to testify, but only to produce specific records.

On July 15, 1975 Freedman appeared before the grand jury but refused to produce the subpoenaed records for the reasons previously asserted, and because the production of such materials would violate his privilege against self-incrimination, and because he suspected that he had been the subject of unlawful electronic surveillance by the United States. On July 16, 1975 the district court entered an order scheduling a hearing on July 23, 1975 to determine (a) whether the law firm of Freedman, Borowsky & Lorry is a sole proprietorship of Freedman, as he contended, and (b) whether the grand jury subpoena was issued as a result of any unlawful electronic surveillance.[3]

2. Affidavit of Frank C. Razzano, Assistant United States Attorney for the District of New Jersey, 11a-13a.

The hearing actually commenced on July 24, 1975. In response to the suggestion that the grand jury subpoena might have been the result of unlawful electronic surveillance, the government produced the affidavit of Frank C. Razzano, an Assistant United States Attorney, and a letter from an official of the Department of Justice.[4] The hearing was addressed primarily to Freedman's contention that he had the sole proprietary interest in the subpoenaed records, and that they were covered by his privilege against self incrimination. The district court concluded that the subpoenaed records belonged to the law firm of Freedman, Borowsky & Lorry, an institutional entity separate and apart from Freedman, and thus that the records were not held by Freedman as personal and private effects but in a representative capacity for the entity. The court also concluded that the government's denial of unlawful electronic surveillance satisfied 18 U.S.C. § 3504(a)(1)(Supp. 1973). It denied the motion to quash and ordered Freedman to produce the records to the grand jury on August 12, 1975. As with the July 14, 1975 order, the court directed production only, not testimony. 399 F. Supp. at 679.

When Freedman did not comply the court, on the government's petition, directed that he show cause on Septem-

3. The order also directed Freedman to produce the records for examination in camera to assist the court in ruling on the contention that the law firm was a sole proprietorship. When Freedman refused to comply with that part of the order he was adjudged to be in civil contempt. On July 22, 1975 a panel of this court summarily reversed both the finding of civil contempt and the order for in camera production of the records, without prejudice to the right of the United States to reinstate contempt proceedings following the evidentiary hearings scheduled for July 23, 1975.

4. The electronic surveillance issue is discussed hereinafter at p. A11.

ber 8, 1975 why he should not be adjudged in criminal and/or civil contempt. In answer to the petition Freedman asserted that he should not be adjudged in contempt because:

"(a) Mr. Freedman is entitled to assert his privilege against self-incrimination with respect to the records;

(b) the government has failed sufficiently and adequately to attest to relevancy, jurisdiction and proper purpose;

(c) the subpoena is overbroad and amounts to an unreasonable search and seizure; and

(d) the government insufficiently denied Mr. Freedman's claim of electronic surveillance . . . ."

On the adjourned return date of the order to show cause the government pressed only the application for civil contempt. After hearing testimony and argument the district court concluded that Freedman was in civil contempt and entered an order remanding him to the custody of the Attorney General until he complied with the order for production of the records. It also assessed a coercive fine of $1500 per day until such time as he complied. From that order Freedman appeals, asserting the four objections to the production order set forth in his answer to the government's contempt petition, and the additional contention that in a civil contempt proceeding the court may not impose a coercive monetary fine.[5] We vacate the order of the district court and remand.

A. Freedman's Personal Interest in the Law Firm's Records

Freedman, relying on *Bellis v. United States,* 417 U.S. 85, 92-93 (1974), urges that before books, records and

5. The order was stayed by the district court pending an appeal to this court.

papers can be said to fall outside the scope of the fifth amendment privilege against self incrimination the court must find (1) that the records reflect the organized institutional activity of an entity independent of individual members, and (2) that the records subpoenaed are held by the possessor in a representative capacity for that entity. He contends that although the law firm of Freedman, Borowsky & Lorry has held itself out to the public, the courts and the legal profession as a partnership, has filed both federal and local partnership tax returns, has leased office space in the partnership name and purchased office equipment, real estate, securities and insurance in the name of the firm, all the objective indicia of institutional status should in this instance be disregarded because internally Freedman has at all times since 1932 been the sole proprietor of the professional practice in question, under an arrangement whereby his word with respect to every decision is final. He contends that as a law firm Freedman, Borowsky & Lorry has no institutional existence apart from him, and that every book, paper, chair, desk and file is his personal property.

We believe the district court correctly concluded that Freedman's fifth amendment privilege did not embrace the subpoenaed records, and affirm that judgment. On the basis of the facts adduced and found by the district court,[6] we are satisfied that it correctly held that Freedman, Borowsky & Lorry possesses an identity separate and distinct from that of the petitioner. It is true that Freedman, and several members of the firm, testified that despite all objective external manifestations, Freedman, Borowsky & Lorry is not an institution having separate existence from Freedman, and is his alter ego only. But their testimony to that effect reflects only their legal conclusion. The objective facts found by the district court fully support the contrary legal conclusion.

6. The district court's findings of fact are set forth in its opinion. 399 F. Supp. at 669-75.

Freedman contends that the district court's finding that he alone among the lawyers had access to the books and ledgers of Freedman, Borowsky & Lorry establishes his privilege to the records under the second prong of the *Bellis* test. This argument distorts the holding of that case.

We do not understand *Bellis* to hold that once an institution is determined to be an entity independent of its members, the records of that entity may nonetheless be protected by the purely personal privilege against self-incrimination if the members of the organization agree that access to those records will not be shared. Access is one indicium bearing upon the question of institutional separateness. In this case, the facts found by the district court, including facts pertaining to Freedman's exclusive access to certain financial books and records, fully support the conclusion that Freedman, Borowsky & Lorry has an institutional identity apart from Freedman. That being so, the fact that Freedman preserves his exclusive access to certain records is inconsequential for fifth amendment purposes. To hold the members of an institution could resurrect the fifth amendment privilege with respect to records that they individually forfeited by identifying themselves with that institution would seriously erode the established principle that the privilege against self-incrimination is purely personal. *See Hale v. Henkel,* 201 U.S. 43 (1906). This we decline to do. We therefore hold that Freedman was not legally entitled to assert his fifth amendment privilege in defense to production of the subpoenaed records.

B. The Government's Showing of Relevancy, Jurisdiction, and Proper Purpose

In *Schofield I* we held that the district courts in this circuit should not casually rubber stamp petitions for the enforcement of grand jury subpoenas, but should require that the government show (1) the grand jury's jurisdiction, (2) relevancy of the subpoenaed materials to an investigation within that jurisdiction, and (3) the absence of an unrelated purpose.

Freedman's objection to the grand jury investigation in Newark is territorial. The law firm has offices in Philadelphia and New York. The National Maritime Union has its headquarters in New York. Although some members of the law firm and some officers of the union reside in New Jersey, he urges that the investigation will necessarily center around activities in New York and in Philadelphia. We have said "Historically, Grand Juries have been constituted for the purpose of ascertaining whether or not crimes have been committed *in their district. United States v. Neff,* 212 F.2d 297, 303 (3d Cir. 1954) (emphasis supplied). *See also Brown v. United States,* 245 F.2d 549 (8th Cir. 1957); *United States v. Lazaros,* 480 F.2d 174, 178 n.6 (6th Cir. 1973); Comment, United States v. Dionisio: The Grand Jury and the Fourth Amendment, 73 Colum. L. Rev. 1145, 1147-48 (1973). But since the grand jury is investigating allegedly illegal payments which may not have been reported as income by residents of the district of New Jersey, or which may have been illegally deducted in computing the income tax paid by residents of New Jersey, the contention that the subpoena was issued by a grand jury which lacked jurisdiction is fanciful.[7]

Turning to relevancy and purpose, we note that the government's affidavit discloses that the subpoena is for the purpose of a proper grand jury investigation, and not primarily for another purpose. It cannot be gainsaid that much of the material subpoenaed would be relevant to an inquiry into illegal payments allegedly made to officers of the National Maritime Union. Here, however, we come to the question of overbreadth. If the subpoena seeks large quantities of documents some of which appear to be rele-

7. We reject as incompatible with our holding in *Schofield I* the government's argument that the person to whom a grand jury subpoena is directed lacks standing to challenge the jurisdiction of the issuing body.

vant to the investigation which has been identified by the government as the jurisdictional predicate for grand jury action, the court cannot without further inquiry accept at face value the conclusory allegation that the subpoena is not for a purpose unrelated to that inquiry.

The subpoena in this case commands production of 26 categories of documents for a ten year time span. Although only the relationship between Freedman, Borowsky & Lorry and the National Maritime Union has been identified as the focus of the investigation, the subpoena seeks financial records relating to non-maritime clients as well.[8] The overbreadth objection was made at the outset. The district court ruled:

> "I'm sure the Department of Justice has no interest in Jones to McLaughlin, any conveyance for real estate, for example, or as to a bill paid, but it should be produced, in this Court's opinion, and it will be returned forthwith, I am sure it will." (Tr. July 14 hearing, 36a-37a).

With deference, we conclude that this ruling was an insufficient compliance with the requirements of *Schofield I*. Freedman was entitled to *some* explanation why records of the firm's dealings with other clients, or with suppliers of office supplies, was relevant to the grand jury's investigation of graft in the NMU. Without *some* explanation, the district court simply cannot discharge its obligation to guard against misuse of the court's process. It is not enough to require the indiscriminate production of records and then permit the return of irrelevant documents after the government has rummaged through them. The overbreadth problem is particularly acute with respect to institutions such as law offices, with which third parties often deal with significant expectations of privacy.

8. A good example of the breadth of the subpoena is category 14, "Contracts and copies of contracts including all retainer agreements."

C. Freedman's Overbreadth Contention

Freedman would have us not only rule on the sufficiency of the government's showing of relevance, but also hold that as a matter of law the subpoena is so overbroad as to violate the fourth amendment and thus can be ignored. This we cannot do at the appellate level on this record. It is conceivable that the government will be able to satisfy the district court that most, if not all, of the subpoenaed materials are relevant to the grand jury's investigation. And while we have held that the district court required too little disclosure of relevancy, at the same time we disapprove the remedy to which Freedman resorted: the withholding of all records, even those clearly relevant. There are materials listed in the schedule attached to the subpoena which under the narrowest definition of relevancy should have been produced. It is arguable, of course, that when the government draws an overbroad subpoena the court should merely decline enforcement under 28 U.S.C. § 1826(a). Such a wooden construction of the civil enforcement remedy would result in the multiplication of civil enforcement proceedings. Our ruling in *Schofield I* was not intended as an opportunity for gamesmanship, but as a device for the protection of substantial interests of privacy. Nor should it make any difference that the proceedings were commenced by Freedman's motion to quash rather than by a government motion to enforce. The proper remedy for overbreadth is an order directing partial compliance. The district court should then rule on the disputed items. At a minimum the records relating to the firm's relationship with the National Maritime Union should have been ordered produced immediately.

(D) The Government's Denial of Electronic Surveillance.

When a grand jury witness raises the issue of possible electronic surveillance as the source of a subpoena or ques-

tions, the government is bound to affirm or deny the occurrence of such surveillance. 18 U.S.C. § 3504(a)(1)(Supp. 1973). An insufficient denial is just cause for refusing to answer questions or produce subpoenaed records. *Gelbard v. United States,* 408 U.S. 41 (1972). Freedman raised the issue. In response the government filed the affidavit of Frank C. Razzano, an Assistant United States Attorney conducting an investigation of alleged violations of the federal criminal law by the National Maritime Union. He swore that he had received no information that would indicate any electronic surveillance of Freedman or of any premises owned, leased or licensed by him, that he inquired of the United States Attorney for the District of New Jersey whether there was any electronic surveillance and had been informed that none was authorized or engaged in, and that on July 16, 1975 he caused a similar inquiry to be made of the Department of Justice. The government also produced a response to that inquiry in a letter quoted in the margin.[9] The district court concluded:

> This court is satisfied on the basis of the representations of the United States and the lack of proof on the part of petitioner that there was no electronic surveillance in this case on the part of any government agency.[10]

9. The government's response, addressed to Jonathan Goldstein, United States Attorney for the District of New Jersey and signed by William Lynch, Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Justice Department, read as follows (426a):

"This is with regard to your request that we ascertain whether the following individual was monitored by electronic surveillance.

A review of the Department of Justice files discloses no information indicating that conversations of Abraham E. Freedman were at any time overheard by electronic surveillance or that premises known to be owned, leased or licensed by him were covered by electronic surveillance by the Federal Bureau of Investigation.

Also, the above-named individual was never subjected to electronic surveillance by the Internal Revenue Service, the United States Postal Service, the United States Secret Service, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, or the Bureau of Customs."

10. 399 F. Supp. at 678-79.

In *United States v. D'Andrea,* 495 F.2d 1170 (3d Cir.)(per curiam), *cert. denied,* 419 U.S. 855 (1974), this court held that a denial based on third-party information is sufficient compliance with 18 U.S.C. § 3504(a)(1) where the complaining party has come forward with nothing more than a bald allegation of illegality. *See also In re Horn,* 458 F.2d 468 (3d Cir. 1972)(per curiam). Freedman argues that a more formal denial is necessary in this case because he has substantiated his charge with more than conclusory allegations. Specifically, Freedman stated in an affidavit that "[f]or some time prior to June 18, 1975" he was aware of "[s]trange noises or 'clicks'" during phone conversations, and that "on occasion, calls were inexplicably disconnected." Freedman's affidavit further recites that he engaged a private investigator to scan the law firm's offices for the presence of electronic surveillance. During this scan the investigator detected a positive response, "indicating that electronic surveillance *might* be present" (emphasis supplied). Subsequent checks of the firm's telephone lines by the telephone company and another private investigator did not uncover any surveillance. We do not believe that these minimal factual allegations require the government to respond to Freedman's inquiry with any more formal denial than was entered here. We find no error in the court's ruling that the government's denial was adequate. We reject Freedman's contention that we should reconsider our *D'Andrea* holding and place a heavier burden on the government than the case imposed.

(E) The Coercive Fine

After adjudging Freedman to be in civil contempt the court ordered him jailed until he complied and also ordered him to pay $1500 for each day he continued to be in contempt of its order. The $1500 per day fine is intended as a coercive sanction to force compliance with the order. Freedman urges that there is no statutory authority for

such a sanction. Authority for civil coercion for disobedience of court orders in connection with grand jury proceedings is found in Title III, § 301(a) of the Omnibus Crime Control Act of 1970, 28 U.S.C. § 1826(a). The statute in terms refers only to coercion by confinement, but its legislative history indicates that it was intended to "codify present civil contempt practice."[11] We have found no case where a coercive fine was imposed on a contumacious witness under 28 U.S.C. § 1826(a). In *United States v. Liddy*, 510 F.2d 669, 676 (D.C. Cir. 1974)(en banc), *cert. denied*, 420 U.S. 980 (1975), the District of Columbia Circuit suggested in dicta that the court might lack power under the statute to utilize such a remedy. But monetary penalties for civil contempt have been justified in other contexts as valid attempts to coerce compliance with court orders. *See, e.g., United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 976 (1974). In at least one case prior to the enactment of § 1826 a federal court imposed a coercive fine on a witness who failed to appear before a grand jury. *United States v. Germann*, 370 F.2d 1019 (2d Cir.), *vacated per curiam on other grounds*, 389 U.S. 329 (1967). We do not detect in the enactment of § 1826 an intention on the part of Congress to remove from the arsenal of the federal courts on enforcement weapon they were long thought to possess.

This conclusion is reinforced by the manifest necessity for some civil sanction other than imprisonment of a civil contemnor. By the terms of § 1826(a)(2), a person who refuses to purge himself of his contempt can be imprisoned only for the life of the grand jury whose order he has ignored. As the term of a grand jury draws to a close, the coercive effect of the jail sanction is obviously attenuated. If the grand jury were denied an effective

11. H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970), 1970 U.S. Code Cong. & Admin. News 4008, quoted in *Schofield I*, *supra*, 486 F.2d at 88.

sanction for disobedience occurring late in its life, its ability to discharge its duties would be seriously impaired. We do not believe that in enacting the Omnibus Crime Control Act—a decidedly hard-line piece of anti-crime legislation—Congress intended to accomplish such a result. We therefore conclude that the district court has power to impose upon a civil contemnor a coercive monetary fine.

It does not necessarily follow, however, that the range of penalties available to a court under § 1826 are cumulative. We have not been cited to any case where a coercive monetary fine was levied in conjunction with imprisonment. These flexible sanctions, in our view, allow the district court to apply the degree of coercion minimally necessary to gain compliance with its orders, but do not vest the court with the power to visit Draconian punishment upon the civil contemnor. We therefore hold that a district court may use these civil sanctions interchangeably or successively, but not simultaneously in the absence of findings supported by the record showing the necessity for such severe action. The court should apply the least sanction (e.g., a monetary penalty) reasonably calculated to win compliance with its orders. If compliance is not forthcoming, the initial penalty may be increased, or a new penalty appropriate under the circumstances may be selected. We do not believe that the simultaneous imposition of monetary and jail sanctions necessarily adds to the in terrorem effect of a properly devised solitary sanction. *Cf.* 18 U.S.C. § 401.

Conclusion

The order of the district court directing compliance with the grand jury subpoena was correct in all respects except for the court's failure to require a more complete showing of the relevancy to the grand jury investigation of some of the materials subpoenaed. Freedman should have complied with the order at least to the extent of furnishing

all materials relating to the National Maritime Union's dealings with Freedman, Borowsky & Lorry. Since, however, he had at the outset objected to the subpoena on overbreadth grounds the order of the district court adjudging him in contempt will be vacated and the case remanded to the district court for the purpose of (1) affording Freedman an opportunity promptly to furnish those materials listed in the schedule attached to the subpoena relating to the dealings between the National Maritime Union, its officers and agents, and the firm of Freedman, Borowsky & Lorry, and (2) affording the government the opportunity to demonstrate that other records listed in the schedule are relevant to the grand jury's investigation.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX C.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

Misc. No. 75-11

IN THE MATTER OF GRAND JURY PROCEEDINGS
Re: Grand Jury Empanelled
January 21, 1975.

Appearances:

Jonathan L. Goldstein, Esq.
United States Attorney
– and –
Andrew R. Jacobs, Esq., and
Frank C. Razzano, Esq.,
Assistant U. S. Attorneys
970 Broad Street
Newark, New Jersey 07101

Amster & Levin, P. A.
By: Richard A. Levin, Esq.
11 Commerce Street
Newark, New Jersey 07102

Wolf, Block, Schorr & Solis-Cohen
By: Howard Gittis, Esq.
Packard Building
Philadelphia, Pennsylvania 19102

OPINION

WHIPPLE, *Chief Judge*

On June 18, 1975, a subpoena *duces tecum* was delivered to the law offices of Freedman, Borowsky and Lorry, directing an appropriate representative to produce before the grand jury certain books, papers and records. On July 11, 1975, Abraham E. Freedman (hereinafter petitioner), filed a motion to quash the subpoena. After oral argument on July 14, 1975, this Court denied the motion and petitioner was directed to produce all of the records described in the subpoena the next morning. On July 15, 1975, petitioner appeared before the Grand Jury and refused to produce the subpoenaed records on the ground that, *inter alia,* the production of such materials would be in violation of the self-incrimination provision of the fifth amendment to the Constitution. The United States moved this Court, at that time, to hold petitioner in civil contempt.

It was the ruling of this Court that petitioner be required to produce the subpoenaed records, in camera, on July 16, 1975. On that date, petitioner failed to produce the records in question and, after oral argument, this Court adjudged petitioner to be in civil contempt pursuant to 28 U. S. C. § 1826. The Court ordered that petitioner be placed in custody and be fined the sum of $1,500.00 daily, until such time as he produced the records in question. The sentence was immediately suspended "until further order of this Court pending disposition of other issues which have been raised in this cause." The Court also ordered that a hearing be held on July 23, 1975 to determine whether petitioner should be held in criminal contempt.

On July 17, 1975, petitioner filed a notice of appeal to the Third Circuit Court of Appeals from this Court's adjudication and sentence of contempt.

On July 22, 1975, petitioner filed with the Third Circuit Court of Appeals an application for a stay of the hearing scheduled for July 23, 1975, pending appeal. On July 22, 1975, the Third Circuit, while denying petitioner's motion for a stay, entered an Order reversing the Order of this Court directing petitioner to produce the subpoenaed records. The Court of Appeals further reversed this Court's Order of Contempt, without prejudice to the rights of the United States to reinstitute contempt proceedings following the evidentiary hearing then scheduled to begin July 23, 1975.

An evidentiary hearing concerning the basis for petitioner's assertion of the fifth amendment privilege was held on July 24, 1975. Also the subject of inquiry at the hearing was petitioner's contention that he may have been the subject of illegal surveillance by the United States.

FINDINGS OF FACT.

1. Petitioner is an attorney-at-law (T-7).

2. Petitioner was admitted to the Bar of the Commonwealth of Pennsylvania in 1933 (T-84).

3. In approximately 1934, petitioner formed the law firm of Freedman, Goldstein and Pechner of Philadelphia, representing itself to third parties and to the public as partners (T-88).

4. From 1938 to 1944, petitioner practiced as a member of the firm of Freedman and Goldstein. During that time, Freedman and Goldstein held themselves out as partners to the public and to third parties (T-91).

35. Bills sent out for legal services performed by members of the firm are sent out in the name of Freedman, Borowsky and Lorry, at the direction of various attorneys in the firm (T-74, 75).

36. Renumeration for the legal services is made payable to the law firm and deposited in bank accounts in the firm's name (T-75).

37. The law firm of Freedman, Borowsky and Lorry may have purchased municipal bonds with monies of the firm (T-46).

38. The law firm of Freedman, Borowsky and Lorry has purchased in the firm name bonds of the Commonwealth of Pennsylvania (T-48).

39. The law firm of Freedman, Borowsky and Lorry has purchased State of Israel Bonds for several years in the firm name (T-48).

40. Freedman, Borowsky and Lorry has an organizational structure whereby a member of the firm assigns various cases to various partners and associates depending upon the potential recovery estimated in each case (T-198).

41. The monthly payroll of the law firm of Freedman, Borowsky and Lorry is at least $25,000.00 (T-49).

42. The law firm of Freedman, Borowsky and Lorry pays for its day-to-day services and bills, including monthly rental of office premises, telephone bill, xerox, etc., in the firm name with monies from bank accounts held in the name of Freedman, Borowsky and Lorry (T-50, 51).

43. Petitioner has no bank account of his own at the Continental Bank (T-51).

44. The law firm of Freedman, Borowsky and Lorry enters into agreements, including retainers for legal services, with clients in the firm name of Freedman, Borowsky and Lorry (T-54).

45. For the years 1970, 1971 and 1972, the total billings of the law firm of Freedman, Borowsky and Lorry were respectively $3,726,510.37, $3,331,986.59 and $3,337,-819.16 (T-127) (G-10a, b, c).

46. $600,000 in bank certificates were purchased, probably in the firm name, for the purpose of paying the individual federal income taxes of each of the law firm's partners (T-46).

47. The assets of the law firm of Freedman, Borowsky and Lorry, including the desks, tables, typewriters, chairs, etc., were paid for from the law firm's account (T-112).

48. The law firm of Freedman, Borowsky and Lorry maintains a legal malpractice insurance policy in the firm's name, covering all of the lawyers in the firm. This insurance policy is paid for by the firm of Freedman, Borowsky and Lorry (T-79, 80).

49. The law firm of Freedman, Borowsky and Lorry pays Workmen's Compensation Insurance in the firm's name with the firm monies covering employees of the firm (T-80).

50. The law firm of Freedman, Borowsky and Lorry makes payments on behalf of the firm to the Commonwealth of Pennsylvania Commission on Sales Tax (T-81).

51. The law firm of Freedman, Borowsky and Lorry carries group life insurance covering all of the profit-sharing attorneys in the firm and perhaps the salaried attorneys as well (T-81, 141).

52. The law firm of Freedman, Borowsky and Lorry makes payment in the firm name for Blue Cross, Blue Shield Medical Insurance for all of the members, associates and employees thereof (T-82).

53. The law firm of Freedman, Borowsky and Lorry has a Retirement Plan to which the firm makes contributions in the firm name (T-138).

54. The law firm of Freedman, Borowsky and Lorry may have held title to real estate in Philadelphia (T-45).

55. Petitioner himself refers to members of his firm as "partners", specifically testifying during the course of this hearing that "all partners share in the profits" (T-40).

56. The law firm of Freedman, Borowsky and Lorry holds itself out to the legal profession in *Martindale-Hubbell* as a law firm with 12 members and 9 associates (T-41).

57. Petitioner, Wilfred Lorry, Milton Borowsky, M. Vigderman, Joseph Weiner, Marvin Levin, Abram Adler, Marvin Barish, Charles Sovel, Bert Zibelman, Robert C. Daniels and Arnold Levin are listed in Martindale-Hubbell as members of the firm (T-39).

58. At least 1 member of the law firm of Freedman, Borowsky and Lorry has at various times, and in various ways, held himself out as a partner of the firm (T-23).

59. In correspondence to the Philadelphia Bar Association, at least one member of Freedman, Landy and Lorry, and its successor firm, Freedman, Borowsky and Lorry, held himself out as a partner of the firm and has referred to other members of the firm as partners (T-23).

60. In responding to complaints made to the Board of Censors of the Philadelphia Bar Association, members of the law firm of Freedman, Borowsky and Lorry specifically requested that complaints be viewed as a complaint against the firm rather than a complaint against an individual of the firm (T-30).

61. Wilfred Lorry is an attorney and member of the Bar of the Commonwealth of Pennsylvania (T-167).

62. Wilfred Lorry was associated in the full-time practice of law with petitioner from 1944 to 1967 (T-169).

63. Since 1944, Wilfred Lorry's name has been used together with petitioner's name in their association; from 1944 to 1962 as "Freedman, Landy and Lorry", and from 1962 to date as "Freedman, Borowsky and Lorry" (T-170).

64. In written and and oral representations to the public and the legal profession, Wilfred Lorry, pursuant to his agreement with petitioner, held himself out as a partner in the law firm of Freedman, Borowsky and Lorry (T-186).

65. Wilfred Lorry held himself out to be a partner in the firm of Freedman, Borowsky and Lorry for practical business purposes and knew that federal partnership income tax returns were prepared in the partnership name (T-184, 185).

66. Wilfred Lorry held himself out as a partner of the law firm of Freedman, Borowsky and Lorry before the Committee of Censors of the Philadelphia Bar Association, and represented to that association that the firm included other partners (T-190).

67. Wilfred Lorry held himself out to be a partner of the law firm of Freedman, Borowsky and Lorry to the Courts in which he practiced (T-190).

68. The firm of Freedman, Borowsky and Lorry held itself out to the general public and legal profession as a

partnership because it was felt that this would be a good business practice and aid in bringing in business (T-177, 178).

69. Petitioner represented the law firms of Freedman, Landy and Lorry and, its successor firm, Freedman, Borowsky and Lorry to the public as a partnership and Wilfred Lorry never did anything to dissuade anyone from that conclusion because it was believed to be a good business practice to make and perpetuate this representation (T-203).

70. During his twenty-two years with petitioner, Lorry never looked at the financial records nor had access to them (T-171).

71. To Lorry's knowledge, no lawyer other than petitioner had access to the financial records of Freedman, Borowsky and Lorry (T-171).

72. During his twenty-two year association with petitioner Lorry never saw the partnership tax returns filed for either Freedman, Borowsky and Lorry or Freedman, Landy and Lorry (T-173).

73. Petitioner refers to the junior profit-sharing members of his firm as "Junior Partners" (T-106).

74. The law firm of Freedman, Borowsky and Lorry files federal partnership tax returns (T-8).

75. On the Federal Partnership Income Tax return of Freedman, Borowsky and Lorry, the employer identified thereon is the law firm of Freedman, Borowsky and Lorry. Likewise, the firm name appears on W-2 forms of the firm's employees (T-114) (G-10a,b,c).

76. As set forth in the firm's Federal Partnership Tax Return for the years, 1970, 1971 and 1972, respectively, the total income earned by the firm's 11 partners was approximately $2,202,367.73, $1,673,834.94 and $1,497,223.50 (T-128, 129) (G-10a,b,c).

77. The firm's Federal Partnership Tax returns reflected first year depreciation divided proportionately among all of the partners of the law firm, not taken solely by petitioner individually in its total amount (T-131, 133).

78. As reflected in the firm's Federal Partnership Tax returns, Freedman, Borowsky and Lorry deducts various expenses, including automobile leasing for the members of the firm and the firm investigators. The insurance coverage for these leased automobiles is in the law firm's name and paid by the firm (T-139).

79. The law firm of Freedman, Borowsky and Lorry has claimed as a deduction promotional expenses in the amount of $210,000.00 in its 1972 tax return which sum was expended by various members of the firm (T-139) (G-10c).

80. The firm, as reflected in its 1972 tax return, has deducted approximately $71,000.00 in convention and meeting expenses for various members of the firm (T-140) (G-10c).

81. The law firm of Freedman, Borowsky and Lorry has deducted proportionately from its gross income contributions in excess of $54,000.00 made to various charities on behalf of the firm (T-142) (G-10c).

82. The Federal Partnership Tax returns of the law firm of Freedman, Borowsky and Lorry reflect that the firm has paid Philadelphia City tax, Net profit tax, Mercantile tax, General Business tax, Personal property tax, and sales and occupancy tax (T-123) (G-10a,b,c).

83. The federal partnership returns of the firm of Freedman, Borowsky and Lorry have set forth the firm's capital account, from beginning of the year as to each one of the firm's partners, ordinary income, additional first year depreciation, contributions that were made, withdrawals, distribution, capital income at the end of the year (T-127) (G-10a,b,c).

84. All so-called profit-sharing members of Freedman, Borowsky and Lorry contributed capital to the law firm of Freedman, Borowsky and Lorry as reflected in their respective capital accounts (T-108, 109) (G-10a,b,c).

85. On June 18, 1975 petitioner was served by an agent of the United States Attorney's Office with a Grand Jury Subpoena to produce certain books and records of the law firm of Freedman, Borowsky and Lorry. At that time the records subpoenaed were either in the firm's Philadelphia office or in the firm's New York office, and some in the possession of the law firm's accountant, Murray Axelrod (T-54, 55, 56) including all of the accountant's work papers; financial statement file; copies of Federal Income Tax returns of the Partnership; City Tax returns of the partnership and Individual Partners and State Tax returns (G-9).

86. On or about June 27 and 30, 1975, petitioner called the law firm's accountant, Murray Axelrod, and asked him to deliver to the firm of Freedman, Borowsky and Lorry all of the records in his possession (T-56).

87. Pursuant to the direction of petitioner, Murray Axelrod, the accountant for the firm of Freedman, Borowsky and Lorry, delivered on or about July 27, and July 30, 1975, to petitioner the various records of the law firm of Freedman, Borowsky and Lorry as set forth in G-9 (T-78, 79).

88. Petitioner has submitted an affidavit in which he contends that he may have been the subject of illegal surveillance by the United States. In support of this allegation, he submits that "the existence of unusual noises or occurrences on the telephone system together with the positive responses obtained . . . in his initial scan of the offices, led [him] to believe that his office may have been subjected to illegal electronic surveillance."

89. The Government has submitted the affidavit of Assistant United States Attorney Frank C. Razzano in which he states that to his knowledge there has been no electronic surveillance of the conversations of petitioner or any electronic surveillance of conversations occurring on premises owned, leased or licensed by him whether or not he was present or participated in those conversations, by the United States Attorney's office or any agency in the investigation.

90. The United States has also submitted a letter from the United States Department of Justice to the effect that an inquiry has been made with the appropriate federal government agencies in order to determine if there has been any electronic surveillance occurring on premises owned, leased or licensed by him whether or not he was present or participated in those conversations. Based upon the results of such inquiry, the U. S. Department of Justice has represented that there has been no electronic surveillance of any conversation of petitioner or any electronic surveillance of any premises owned, leased or licensed by him.

91. Petitioner has failed to offer any evidence indicating that the affidavit of Assistant United States Attorney Frank C. Razzano and the letter from the U. S. Department of Justice were false or defective.

92. Petitioner has contended that the grand jury subpoena requiring the production of the firm's financial books and records for the relevant period under investigation is overly broad, burdensome and unreasonable.

93. Petitioner has failed to establish these allegations and the United States has demonstrated the relevancy, necessity and reasonableness of the documents subpoenaed in the affidavit of Assistant United States Attorney Frank C. Razzano dated July 10, 1975.

Conclusions of Law.

The principal question presented for decision is whether the nature and character of the documents sought by the Grand Jury is such that petitioner, Abraham E. Freedman, may assert the fifth amendment privilege against self-incrimination with respect to their production.

In order to place the facts of this case in their proper perspective it is necessary to consider the fifth amendment privilege in the context of some basic postulates. It is of course axiomatic in our system of justice that a witness may not be compelled to give testimony which would tend to incriminate him. This constitutionally inviolable privilege, however, is a purely personal one which precludes the government from eliciting testimony from the individual himself. In other words, the privilege inheres to the person invoking it and may not be claimed by one for the benefit of another. As Mr. Justice Holmes described it, "A party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228 U. S. 457, 458 (1913).

As early as 1886, the United States Supreme Court held that the fifth amendment proscribes the compulsory production of incriminating personal papers and effects in addition to oral testimony. *See Boyd v. United States*,

116 U. S. 616 (1886). As the Court stated in the important case of *Bellis v. United States*, 417 U. S. 85, 87-88 (1974):

> The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life [citations omitted].

And in *United States v. White*, discussed at length in *Bellis*, the Supreme Court described the principle thusly:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals . . . It is designed to prevent the use of legal process to force . . . him to produce and authenticate any personal documents or effects that might incriminate him.

322 U. S. 694, 698 (1943).

Although the fifth amendment does not prevent the compulsory production of an individual's books or records, it will not shield that individual from producing potentially incriminating records which he holds in a representative capacity for a collective entity. *See Wilson v. United States*, 221 U. S. 361 (1911) (officer of corporation could not claim privilege against self-discrimination where Grand Jury subpoena was directed to corporation itself); *Dreier v. United States*, 221 U. S. 394 (1911) (Officer of corporation could not claim privilege against self-incrimination where subpoena seeking corporate books and records was directed to the individual corporate officer); *Wheeler v. United States*, 226 U. S. 478 (1913) (fifth amendment privilege could not be claimed with respect to corporate records even though the corporation had pre-

viously been dissolved); *see also Grant v. United States,* 227 U. S. 74 (1913).

The aforementioned cases relied, at least in part, upon the fact that the documents sought were those of corporations--artifical entities to which limited powers were granted by the State and which were subject to the retained right of the State to investigate corporate activities. *See, e.g., Wilson v. United States, supra,* at 382-85. However, in *United States v. White, supra,* the Court clearly enunciated that the prior decisions were by no means limited to records of corporations alone. In that case, the Court held that an officer of a labor union, an unincorporated association, could not claim a privilege against self-incrimination and was required to comply with a Grand Jury subpoena directed at the union's records. An individual, therefore, could not assert a fifth amendment privilege where he held the records of an organization in a representative capacity. 322 U. S. at 699-700. Justice Murphy reasoned that

> individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations.

322 U. S. at 699.

The Court, in subsequent decisions, has upheld the production of various organizational records over the fifth amendment claims of individuals. *See, e.g., McPhaul v. United States,* 364 U. S. 372, 380 (1960) (Civil Rights Congress); *Rogers v. United States,* 340 U. S. 367, 371-72 (1951) (Communist Party of Denver); *United States v.*

Fleischman, 339 U. S. 349, 357-58 (1950) (Joint Anti-Fascist Refugee Committee). *See also Curcio v. United States,* 354 U. S. 118 (1957) (local labor union).

In *Bellis v. United States, supra,* the Supreme Court ruled that a partner in a small law firm could not interpose the fifth amendment privilege to vindicate his refusal to comply with a subpoena requiring the production of partnership books and records. Notwithstanding the limited size of the firm in *Bellis,* the Court was satisfied that it nevertheless had an institutional identity independent of its constituent partners. Since the attorney had possession of the documents in "what can be fairly said to be a representative capacity", the Court held that his personal privilege was inapplicable.

Petitioner herein vigorously argues that, in contrast to *Bellis,* the law firm of Freedman, Borowsky and Lorry, despite its size, is a sole proprietorship, the books and records of which are the private and personal property of petitioner. He asserts that the documents are not in fact organizational and are not held by him in a representative capacity. This Court cannot agree.

While the government suggests that the Court characterize Freedman, Borowsky and Lorry as either a partnership or an unicorporated association, it is unnecessary to do so. *See Bellis, supra* at 101. Whatever the precise label which may be ascribed to the firm, it is clearly not the sole proprietorship which petitioner would have this Court believe. Upon careful consideration of all the facts and circumstances disclosed by the record, this Court concludes that the firm of Freedman, Borowsky and Lorry is an independent institutional entity separate and apart from its individual members.

Although the Court in *Bellis* found that a partnership did exist, the decision rested upon the fact that the firm

was indeed a distinct institutional entity. Stated differently, characterization of the firm as a partnership was not the ultimately determinative factor.

In determining that the firm in *Bellis* possessed an identity separate and apart from its individual members, the Court examined a number of factors. Of importance to the Court were the following:

> The firm maintained a bank account in the partnership name, had "stationery" using the firm name of its letterhead, and, in general, held itself out to third parties as an entity with an independent institutional identity. It employed six persons in addition to its partners, including two other attorneys who practiced law on behalf of the firm, rather than as individuals on their own behalf. It filed separate partnership returns for federal tax purposes, as required by § 6031 of the Internal Revenue Code, 26 U. S. C. § 6031. State law permitted the firm to be sued, Pa. Rule Civ. Proc. 2128, and to hold title to property, Pa. Stat. Ann., Tit. 59, § 13(3), in the partnership name, and generally regarded the partnership as a distinct entity for numerous other purposes.

417 U. S. at 96-97. The government correctly points out that each of those indicia is present in the case at bar.

Freedman, Borowsky and Lorry had at least three bank accounts in the firm name. In addition, both petitioner and Wilfred Lorry have admitted representing themselves as partners in the firm of Freedman, Borowsky and Lorry on numerous occasions. These representations have been made over a period of many years to the courts, bar associations, clients, and to the public at large. The firm employs approximately fifty individuals other than attorneys, in both Philadelphia and New York City. The

firm consists of twelve profit-sharing attorneys who are held out as partners in the firm, and nine salaried attorneys. The firm files separate partnership returns for federal tax purposes and may have held title to real property in the firm name. Furthermore, the lease to its office space was negotiated in the firm name by petitioner and two of his "partners".

There are several other factors which lend support to this Court's conclusion. For example, the hearing disclosed the following:

> (a) the firm represents itself in *Martindale-Hubble* as consisting of twelve members and nine associates;
>
> (b) the firm has purchased in the name of Freedman, Borowsky and Lorry, bonds of the State of Pennsylvania and the State of Israel;
>
> (c) the firm makes payments for Blue Cross or Blue Shield medical insurance policies;
>
> (d) the firm pays Workmen's Compensation, Pennsylvania Unemployment taxes and Sales taxes in the firm name;
>
> (e) depreciation on firm assets is divided proportionally among all of the profit-sharing members of the firm;
>
> (f) charitable contributions are made in the firm name;
>
> (g) business expenses are deducted from the gross income of the firm;
>
> (h) all of the profit-sharing attorneys have contributed capital to the firm as reflected in their respective capital accounts.

In light of the foregoing, there can be no doubt that the firm of Freedman, Borowsky and Lorry possesses an identity separate and distinct from that of the petitioner.

The Court's analysis, however, must go one step further in order to determine whether the records sought by the grand jury are those of the organization or those of the petitioner, and thus exempt from compulsory production.

Despite the conclusions embodied in petitioner's testimony with respect to his dominion and control over the books and records of the firm, it is the finding of this Court that such records are the property of the collective entity and are held by petitioner in a representative capacity.

The Court is mindful of the differences between the facts in this case and those in both *Bellis* and *White*. In *Bellis*, the Court recognized that the books and records were partnership property subject to the rights of other partners under Pennsylvania law. The Court in *White* acknowledged the right of union members to inspect organizational books and records. Although it appears that no such absolute right of inspection exists in the firm of Freedman, Borowsky and Lorry, that can have little consequence in view of the nature, origins and uses of the organizational records under consideration herein.

Indeed, it is the attorneys in the firm of Freedman, Borowsky and Lorry, rather than petitioner alone, whose activities are primarily responsible for creating the books and records in question. As in *Bellis:*

> These reflect the receipts and disbursements of the entire firm, including income generated by and salaries paid to employees of the firm, and the financial transactions of the other partners.

417 U. S. at 98. It is inconceivable to this Court that the records of a firm which generates in excess of three million dollars annually represent the purely personal interests of petitioner. Quite the contrary, the records sought here are merely the "impassive and impersonal records of business events transacted between the firm and those with whom it dealt." *United States v. Quick,* 336 F. Supp. 744 (E. D. N. Y. 1972). Despite the manner in which petitioner controls the firm's books and records, it is this Court's opinion that he holds them as a representative for the entity known as Freedman, Borowsky and Lorry.

It is therefore the holding of this Court that the law firm of Freedman, Borowsky and Lorry is an institutional entity separate and apart from petitioner and the other members of the firm. Further, the documents sought by the grand jury are not the personal or private effects of petitioner but are held by him in a representative capacity. Accordingly, there can be no rational basis for upholding the claim of fifth amendment protection against compulsory self-incrimination. The sentiments of Mr. Justice Murphy are particularly appropriate here:

> The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organizations. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other

> interests of such organizations so as to nullify appropriate governmental regulations.

United States v. White, supra at 700 [citations omitted].

The only other issue that must be resolved at this time is whether petitioner was the subject of illegal electronic surveillance. This Court is satisfied on the basis of the representations of the United States and the lack of proof on the part of petitioner that there was no electronic surveillance in this case on the part of any government agency. *See United States v. D'Andrea,* 495 F. 2d 1170 (3d Cir.), *cert. denied,* 419 U. S. 855 (1947); *In re Tiernay,* 465 F. 2d 806 (5th Cir. 1972).

In accordance with this Opinion, the petitioner will produce before the grand jury sitting in Newark, New Jersey the documents and records listed in the subpoena. Petitioner shall comply with this directive on August 12, 1975.

The government shall submit an appropriate order forthwith.

LAWRENCE A. WHIPPLE
Lawrence A. Whipple
Chief Judge, U. S. D. C.

Dated: August 1, 1975.

No. 75-1215

In the Supreme Court of the United States

OCTOBER TERM, 1975

ABRAHAM E. FREEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

RICHARD L. THORNBURGH,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 529 F.2d 543. The opinion of the district court (Pet. App. C) is reported at 399 F. Supp. 668.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1976. A petition for rehearing with suggestion of rehearing *en banc* was denied on February 4, 1976 (Pet. App. A1). The petition for a writ of certiorari was filed on February 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a member of a law partnership is entitled to invoke his Fifth Amendment privilege against self-

incrimination as a ground for refusing to comply with a grand jury subpoena for financial records of the partnership.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * * .

STATEMENT

On June 16, 1975, a grand jury of the United States District Court for the District of New Jersey issued a subpoena *duces tecum* to the law firm of Freedman, Borowsky and Lorry, directing "any responsible officer" of the firm to produce various specified financial records of the partnership over the previous eleven years.[1] Petitioner, a partner in the law firm, moved to quash the subpoena on July 11, 1975, alleging that the subpoena was unconstitutionally overbroad and that there had been no showing that the subpoenaed documents were relevant to any investigation over which the grand

[1]The subpoena directed production of the following partnership documents for the period from January 1, 1964, to June 13, 1975: general ledgers, general journals, cash disbursement journal, petty cash books and vouchers, purchase journals, vouchers, paid bills, invoices, cash receipts journal, billings, bank statements, cancelled checks and check stubs, payroll records, contracts and copies of contracts, including all retainer agreements, financial statements, bank deposit tickets, retained copies of partnership income tax returns, retained copies of payroll tax returns, accounts payable ledger, accounts receivable ledger, telephone company statement of calls and telegrams and all telephone toll slips, records of all escrow trust or fiduciary accounts maintained on behalf of clients, safe deposit box records, records of all purchases and sales of stocks and bonds, a complete list of all partners, associates and employees, together with their home addresses, and all W-2 forms for each partner, associate and employee (Pet. App. A3, A30).

jury had jurisdiction. In response, the government submitted an affidavit disclosing that the grand jury was investigating alleged criminal violations by a client of the firm, the National Maritime Union (NMU), and by the union's officers and employees (Pet. App. A3).

On July 14, 1975, the district court denied petitioner's motion to quash and directed him to produce the subpoenaed records on the following day. Petitioner was not ordered to testify. Although petitioner appeared before the grand jury on July 15, he refused to produce the records on the ground that such production would violate his Fifth Amendment privilege against self-incrimination. The government thereupon moved to hold petitioner in civil contempt, and the district court scheduled an evidentiary hearing for July 23, 1975 (Pet. App. A4-A5).[2]

After the evidentiary hearing, the district court concluded that the subpoenaed records belonged to the law firm of Freedman, Borowsky and Lorry, an institutional entity separate and distinct from its members, and were held by petitioner not as his personal and private effects but in a representative capacity for the entity (Pet. App. A38). Petitioner again was ordered to produce the records before the grand jury on August 12, 1975 (Pet. App. A40). When petitioner refused on that day to comply, the court ordered that he show cause why he should not be held in contempt. Following a full hearing on September 8, 1975, the district court adjudged petitioner in civil contempt and ordered him imprisoned and

[2]The court also ordered petitioner to produce the subpoenaed records for an *in camera* inspection. When petitioner failed to comply, he was held in civil contempt. On July 22, 1975, the court of appeals summarily reversed the contempt adjudication and the order requiring *in camera* inspection, without prejudice to the government's right to reinstitute contempt proceedings following the evidentiary hearing (Pet. App. A5, n. 3).

fined $1,500 per day until he produced the documents. The order was stayed by the district court pending appeal.

The court of appeals vacated and remanded. Although it rejected petitioner's claims that he had a Fifth Amendment privilege to refuse production and that the government's showing of relevancy of the records relating to the National Maritime Union had been insufficient, the court held that there had been an inadequate explanation of the grand jury's need for financial records relating to other clients of the firm (Pet. App. A6-A10). The order adjudging petitioner in civil contempt was therefore vacated and the case remanded to the district court to afford petitioner an opportunity to furnish the materials relating to the NMU and to allow the government to demonstrate the relevancy of the other materials to the grand jury's investigation (Pet. App. A16).

ARGUMENT

1. In *Bellis* v. *United States,* 417 U.S. 85, the Court held that the Fifth Amendment privilege against self-incrimination was not available to a member of a law partnership which had "an established institutional identity independent of its individual partners" (417 U.S. at 95), where a subpoena had sought financial records of the firm that were held by the member in a representative capacity (*id.* at 97). The court of appeals correctly concluded (Pet. App. A7) that "Freedman, Borowsky & Lorry possesses an identity separate and distinct from that of the petitioner," that the records subpoenaed were held by petitioner as a representative of the law firm, and that *Bellis* therefore controls the situation here.

The facts adduced at the evidentiary hearing indicate that, during the period covered by the subpoena, Freedman, Borowsky and Lorry was one of the largest maritime

and admiralty law firms in the United States, with offices in Philadelphia and New York (F.F. 17, 19).[3] It consisted of twelve profit-sharing members (each of whom contributed capital to the firm), nine associate attorneys, and approximately fifty other employees, including three bookkeepers who maintained the firm's financial and other records (F.F. 18-19, 30, 84). From 1970 to 1972 the firm's total billings exceeded $10 million (F.F. 45).

In addition, the firm filed both federal and state partnership tax returns and held itself out to the public, the courts, and the legal profession as a partnership (F.F. 3-8, 10, 18, 56-57, 67, 74, 85); it maintained bank accounts in the partnership name, used that name on its stationery and retainer agreements, and accepted payments in that name for legal services performed by its members (F.F. 29, 34, 36, 44); ordinary operating expenses, other business expenses, charitable contributions, legal malpractice, medical and life insurance premiums, workmen's compensation insurance, and local taxes were paid from the firm's account (F.F. 42, 47-52, 78-82); and depreciation on the firm's assets was divided proportionately among all of the profit-sharing members of the firm (F.F. 77). These findings clearly reflect that petitioner's law firm was "an independent entity apart from its individual members." *Bellis* v. *United States, supra,* 417 U.S. at 92, and that it was "well organized and structured" and "maintain[ed] a distinct set of organizational records (*id.* at 93).

Petitioner contends (Pet. 8), however, that "*Bellis* makes access [to the subpoenaed records] one of two essential prerequisites to overruling a claim of privilege, and requires unequivocally that the organization '*must*

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[3] "F.F." refers to the district court's enumerated Findings of Fact (Pet. App. A19-A32).

. . . *recognize rights in its members of control and access to them.'* " We disagree. The critical question under *Bellis* is whether, having found the existence of a separate institutional entity, the subpoenaed documents should be considered personal papers of a member of the entity rather than organizational records of that entity held only in a representative capacity. 417 U.S. at 88. While the recognition or denial of a right of access to the records by other members of the entity may be relevant to that determination, the more important factor is the nature of the records themselves.

Here, as in *Bellis,* the documents demanded were "merely the financial books and records of the [law firm]," which "reflec[t]ed the receipts and disbursements of the entire firm * * * ." 417 U.S. at 98. Notwithstanding petitioner's claim of his exclusive access to these records—a claim that is disputed by the district court's findings that the firm's bookkeeper had an access key and that members of the firm were given access to the ledger sheets of the cases they were handling (F.F. 32, 33)—these impersonal financial records of an extensive business enterprise cannot be characterized as petitioner's private papers. See *Bellis* v. *United States, supra,* 417 U.S. at 97-98. Indeed, petitioner's exclusive focus on the right of access, regardless of the size or structure of the business entity or the nature of the documents involved, would allow any unincorporated association to shield its organizational records from grand

jury subpoenas merely by limiting unrestricted access to its records to a single individual.[4]

Nor is there merit to petitioner's suggestion (Pet. 9-10) that the existence of an independent entity is dependent upon a state charter or formal operating agreement. Not only was the adoption of such an agreement not a consideration in *Bellis,* but the record in that case was unclear as to whether a formal partnership agreement even existed. See *Bellis* v. *United States, supra,* 417 U.S. at 96, n. 4. See also *United States* v. *Kuta,* 518 F.2d 947, 953 (C.A. 7), certiorari denied, December 8, 1975 (No. 75-307), where a partner's Fifth Amendment claim was rejected despite the absence of a formal partnership agreement.

2. Finally, in light of events that have transpired subsequent to the court of appeals' vacation of petitioner's civil contempt adjudication and its remand to the district court for further proceedings, review of the instant case would be inappropriate at this time.

On the basis of the evidence offered at the hearing held on July 24, 1975, the district court had substantially accepted petitioner's claim of exclusive access to and control over the firm's records, although ruling that this did not suffice to sustain the claim of privilege. In

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[4]In any event, even if petitioner could establish that the subpoenaed documents were his personal records rather than those of a separate institutional entity, he would still have no Fifth Amendment privilege to refuse production in view of *Fisher* v. *United States,* No. 74-18, decided April 21, 1976. Petitioner does not contend that he personally prepared any of the financial records of the firm or that the subpoena would require him to "restate, repeat or affirm the truth of the contents of the documents sought." Slip op. 17. Indeed, the district court found that petitioner "does not know or is unsure of what types of financial books and records are maintained by the law firm of Freedman, Borowsky and Lorry" (F.F. 31).

February and March 1976, however, seven members of Freedman, Borowsky and Lorry withdrew from the firm and took firm records with them. Proceedings have now been begun in the district court to determine whether petitioner's testimony at the evidentiary hearing may have been inaccurate. These proceedings may compel the district court to alter its findings on petitioner's access and control over the records, which findings are the premise for petitioner's present claims.[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1976.

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[5]Contrary to petitioner's contention (Pet. 14, n. 6), there is no reason to hold this case pending the Court's decision in *Andresen* v. *Maryland*, No. 74-1646, certiorari granted, October 6, 1975, or *Shaffer* v. *Wilson*, No. 75-601, petition for a writ of certiorari pending. *Andresen* presents the question whether the introduction into evidence of a person's books and records, seized in compliance with the Fourth Amendment, may nonetheless violate the Fifth Amendment. In *Andresen*, however, the law firm was a sole proprietorship and the government did not allege that the papers were held only in a representative capacity. Thus the Court's decision could not affect the disposition of this case in a way that would be favorable to petitioner.

DOJ-1976-04

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1215.

ABRAHAM E. FREEDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF.

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REPLY BRIEF.

Several months after the decision of the Third Circuit below, this Court rendered its opinion in *Fisher v. United States*, 44 U. S. L. W. 4514 (April 21, 1976). In a lengthy analysis this Court ruled, for the first time, that the *act* of producing documents in response to a subpoena *duces tecum* may be sufficiently "testimonial", and therefore privileged, particularly when that act *authenticates* the existence of the records or their preparation by the person commanded to produce them.

Neither of the parties and neither of the courts below focused on the issue of whether Mr. Freedman's *act* of producing the subpoenaed records is privileged, primarily because this issue, as framed by *Fisher*, was not relevant at the time. Since Mr. Freedman's firm is a sole proprietorship and since he has continually urged that he alone has exclusive access to and control over the records (F. F. 32, 71), there is a strong possibility that Mr. Freedman may be forced to incriminate himself by the act of producing records in response to the instant subpoena. Thus, in light of *Fisher*, we respectfully urge that the proper approach for this Court would be to grant the pending petition and to remand to the District Court for further proceedings on the issue of the incriminatory incidents of the *act* of producing the subpoenaed records.

The government apparently concedes that *Fisher* has introduced a new legal issue that requires further proceedings before the District Court. At footnote 4 of its brief, the government recognizes that had Mr. Freedman demonstrated that his act of producing his business records would incriminate him, then he might have been able to avail himself of his Fifth Amendment privilege. However, the government urges that *Fisher* requires a denial of this petition because Mr. Freedman did not demonstrate that "he personally prepared any of the financial records of the firm or that the subpoena would require him to 'restate, repeat or affirm the truth of the contents of the documents

sought'" (Gov. Br. fn. 4, quoting *Fisher,* sl. op. 17). The government is correct, but fails to recognize that until *Fisher* Mr. Freedman never had reason to make such demonstrations. He now should be given that opportunity since the relevant legal framework has changed during the time this petition has been pending.

Apart from *Fisher,* nothing the government has said in its brief alters the fact that the Third Circuit has completely misconstrued the law as it existed prior to *Fisher.* For all of its discussion of *Bellis v. United States,* 417 U. S. 85, the government does not and cannot deny the fact that *Bellis* explicitly mandates that the Fifth Amendment privilege be sustained when asserted by an individual who has exclusive "rights of access and control" over business records. *Id.* at 92-93. In the present case it is established by findings of fact of the District Court (F. F. 32, 71) that only Mr. Freedman has such access and control.

The government grudgingly concedes that the question of "access" to the records "may be relevant" to a claim of privilege (Gov. Br. 6), but, echoing the Third Circuit, claims without any supporting authority that the "nature" of the records is "the more important factor" (Gov. Br. 6). Since the records in question here relate to a relatively large business enterprise, the government's position, as well as that of the Third Circuit, is that such records, by their "nature", never can be privileged under the Fifth Amendment.

The fundamental problem with the analysis of the government and the Third Circuit is that, as yet, no court, including this Court, has held that business records *per se* are beyond the scope of the Fifth Amendment. In fact, this Court held to the contrary in *Bellis, supra* at 87-88, when it said that records of a sole proprietor may be privileged, and that principle was preserved in *Fisher, supra* at 4520, to the extent "(c)ompliance with a subpoena tacitly concedes the existence of the papers demanded and their possession or control by" the person subpoenaed. Until this Court explicitly rejects *Bellis* and adopts the reasoning of the Third Circuit, the test of *Bellis,* which includes the criterion of "access and control", is still the law, the Third Circuit to the contrary notwithstanding.

In an attempt to circumvent the undisputed finding of the District Court that Mr. Freedman and only Mr. Freedman has access to and control over the subpoenaed records (F. F. 32, 71), the government distorts certain facts in the record and simply makes up others. Thus, the government begins its brief by characterizing Freedman, Borowsky and Lorry as a "partnership" and Mr. Freedman as a "partner". Presumably the government is attempting to equate this case with *Bellis,* which involved a law *partnership* formed under a Pennsylvania statute. However, the District Court expressly refused to find that Freedman, Borowsky and Lorry was a "partnership" and instead set forth an extensive series of findings consistent with the fact that Mr. Freedman's firm actually is a large, successful sole proprietorship. Because it is, his firm's business records belong to him, and production may incriminate him, as much as any other of his personal records.

After the first two pages of its brief, the government silently abandons the use of the word "partnership" and instead adopts an even stranger approach. On pages 7 and 8 of its brief, it tells the Court, *without any citations to the record* that Mr. Freedman's testimony about his exclusive right of access to his business records may have been "inaccurate" because certain attorneys in his firm have since left and "took firm records with them." With all deference, the government is misleading this Court by reaching beyond the record to tell a story that happens to be untrue. The attorneys who left Mr. Freedman's firm took with them only the files of certain cases they were servicing. In papers since filed with the District Court,

Mr. Freedman has stated that these attorneys have possession of the case files with his permission and only to continue servicing the clients. But, most important, *none of the business records covered by the instant subpoena were removed by anyone. Those records* have remained, as always, in Mr. Freedman's exclusive access and control.

In conclusion, the government distorts the holding of *Bellis,* as well as the record, in an attempt to convince this Court to deny Mr. Freedman's petition. Moreover, the government would apply *Fisher* against Mr. Freedman without affording him *any* opportunity to demonstrate that the *act* producing the subpoenaed records might incriminate him. However, by denying this petition, the law in the Third Circuit, unlike the law in any other Circuit, henceforth will be that *all* business records are beyond the scope of the Fifth Amendment privilege. Contrary to *Fisher,* such a result would be compelled regardless of whether the act of authenticating such records would be incriminatory. We respectfully contend that this radical principle should not become the law anywhere without further guidance from this Court.

Respectfully submitted,

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